86 No. 2040

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1986

In the Matter of
THOMAS J. KAVANAGH,
Conservator of

CARL ROHRBACH,
Conservatee.

RICHARD E. COVEN, Referee, -
Appellee,

v.

THOMAS J. KAVANAGH, Conservator,
Appellant.

On Appeal From the Appellate Division of The Supreme Court of the State of New York

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APPELLEE'S MOTION TO DISMISS APPEAL FROM STATE COURT

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MOTION TO DISMISS APPEAL

INTRODUCTION

Appellee in the above entitled case, pursuant to Rule 16 of the Rules of this Court, respectfully moves to dismiss the appeal on the following grounds:

1. This case is not within the appeal

jurisdiction of this Court.

2. The alleged Federal questions sought to be reviewed were neither timely nor properly raised nor expressly passed on by the courts of New York.

3. The appeal fails to present a substantial Federal question.

4. Appellant's jurisdictional statement does not comply with Rule 15 and Rule 28.4(c) of the Rules of this Court.

STATEMENT

This is an appeal from an order dated March 19, 1987 of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, unanimously affirming, without opinion, an order of the Supreme Court, County of New York, entered on October 6, 1986, which inter alia removed the Appellant as Conservator of the Property of Carl Rohrbach (who thereafter died on November 20, 1986).

Appellant was appointed Conservator by order

of the Supreme Court, New York County, dated May 11, 1981. By petition dated March 3, 1983 of Appellee, as Referee appointed by the Court to examine annual accounts filed by Conservators, a proceeding was commenced pursuant to Section 77.33 of the Mental Hygiene Law of the State of New York to remove Appellant as Conservator. The proceeding culminated in the order entered October 6, 1986 removing Appellant as Conservator due to a conflict of interest (decision dated September 13, 1985, p. 18A, Appellant's Jurisdictional Statement). The affirmance of such order by the Appellate Division is the subject of the present appeal.

Appellant did not appeal the order of the Appellate Division to the Court of Appeals of the State of New York (the highest Court of the State) or seek leave to appeal to the Court of Appeals from such affirmance (although Appellant had earlier moved in the Court of Appeals for permission to appeal from an order of the Appellate Division dated December 4, 1986 denying Appellant's motion for a stay pending the appeal in the Appel-

late Division, such motion having been dismissed by order of the Court of Appeals dated January 20, 1987).

It may be noted that while the appeal was pending in the Appellate Division, Appellant also applied to this Court for a stay pending such appeal and, under number A-626, such application was denied by Justice Marshall on February 27, 1987 and upon re-submission by Appellant to Justice O'Connor and referral to the Court was again denied on March 23, 1987.

ARGUMENT

I. This Case is Not Within the Appeal Jurisdiction of This Court

Appellant in his jurisdictional statement invokes the jurisdiction of this Court under 28 U.S.C., Section 1257 (2) which deals with review by this Court of final judgments or decrees rendered by "the highest court of a State in which a decision could be had".

As noted above, Appellant did not appeal the Appellate Division's order of affirmance to the Court of

Appeals or seek leave to appeal to that Court, but simply served a notice of appeal to this Court incorrectly stating that the Appellate Division "is the Court of last resort on appeals from orders and judgments entered on Referee's reports" (p. 25A). Similarly, Appellant's jurisdictional statement states that "orders entered on a Referee's report are not appealable in this State beyond the Appellate Division***" (p. 3).

Even if Appellant's statements in this respect were correct, the order appealed from was not entered on the Referee's report and the appeal in the Appellate Division was not from an order entered on the Referee's report. The order was in fact entered on the petition to remove the Appellant as Conservator in a special proceeding brought pursuant to Section 77.33 of the Mental Hygiene Law of the State of New York. Thus, the highest court of the State of New York in which a decision could be had in this case was the Court of Appeals, to which no appeal was taken. Appellant's appeal is from an intermediate appellate court of the state and, thus, there is no

jurisdiction in this Court under 28 U.S.C. Section 1257 (2), or any other statute.

II. The Failure to Raise Federal Constitutional Questions in the State Courts

The validity of the state statute (Section 77.33 of the Mental Hygiene Law) involved was never challenged, raised or passed upon prior to the entry of the order in the Supreme Court or even on the appeal therefrom. The opinion of the Court of original jurisdiction (p. 16A, Jurisdictional Statement) does not mention, discuss or pass on any Federal constitutional questions. Appellant's brief on the appeal in the Appellate Division presented four questions, being as follows:

1. Can a litigant be denied a jury trial in contest (sic.) where the sum of $15,000.00 is sought in the form of a judgment?

2. Can a litigant be denied any kind of a hearing in open Court with an opportunity to present witnesses and put in his (sic.) where it is sought to collect from him, $15,000.00 in the form of a judgment?

3. Is a Conservator deprived of due process of law and equal protection of law as required by the U.S. Constitution if the Mental Hygiene Law's Section 77.33 is ignored and a removal petition is not referred to the appointing Judge as the statute requires?

4. Can a Court consistent with the due process requirement of the U.S. Constitution ignore the requirement of Sections 77.33 and 77.07 of the Mental Hygiene Law and entertain a petition to remove a Conservator when there is no due proof of service on any living relative of the Conservatee, and when there are living relative (sic.) in existence?

It will thus be obseved that Appellant did not question the validity of Section 77.33 or claim that the statute was repugnant to the Constitution of the United States, his claim being that the Section was ignored in the state courts. Only at this late date in his jurisdictional statement in this Court (p. i) does Appellant seek to convert his claim that the state courts ignored the requirements of the statute to a claim of constitutional deficiencies in the statute.

The law of New York requires that constitutional questions be raised in the trial court and, if not, they will not be considered on appeal. Moreover, if a

question is raised as to the constitutionality of a statute, the attorney general of the State must be served with notice and it is the duty of the attorney general to appear in support of the constitutionality of the statute. Section 71, New York Executive Law. No such notice was served in connection with any of the proceedings in the state courts herein. Nor was there any appearance by the attorney general in any of such proceedings. Similarly, see Rule 28.4(c) of the Rules of this Court and 28 U.S.C., Section 2403 (b).

None of the opinions of the state courts mention, discuss or pass upon any constitutional questions.

This Court has consistently ruled that before its jurisdiction can be invoked on appeal from a state court, it must appear that the Federal questions involved were properly raised in the State courts at the proper time, as is reflected in Rule 16. Appellant's attempt to raise the question of the constitutionality of the statute for the first time on an appeal to this Court is inappropriate and ineffective to invoke the jurisdiction of this Court.

III. The Appeal Fails to Present a Substantial Federal Question

Appellee respectfully submits that Federal constitutional questions may not be presented to this Court unless the precise questions have been placed in issue before the state courts and passed upon by such courts. This basic procedural and statutory requirement is totally absent in the case at bar.

This case is one of a simple special proceeding pursuant to the Mental Hygiene Law wherein the Conservator who was appointed by the court pursuant to the statute was subsequently removed by the court pursuant to the same statute when the existence of a conflict of interest came to light and was brought to the court's attention. The proceeding did not rise to the level of involvement of the Seventh or Fourteenth Amendments of the United States Constitution, but was concerned principally with issues of fact and the application of the state statute to the facts.

Despite Appellant's professed concern about conservatorship proceedings having grown to "immense

proportions" in New York affecting "fundamental rights guaranteed by the U.S. constitution" and this case standing as a precedent to be cited by "any venturesome predator" (Appellant's page 8), this Court should not need to be assured that the laws of the State of New York dealing with conservatorship are being properly policed and enforced by the appropriate authorities, including Referees, as is evidenced by the order removing the Conservator in this case.

IV. Appellant's Jurisdictional Statement Does Not Comply With Rule 15 and Rule 28.4(c).

Appellant's jurisdictional statement is not only replete with untrue statements of facts, but in many other respects fails to comply with Rule 15. For example, subdivision .1(g) requires a concise statement of the case. Appellant's statement improperly and without relevancy to the resolution of any constitutional questions or other issues drags in "a Genovese crime family 'soldier'" (p. i),

completely irrelevant and scandalous material dealing with various present and former court officials (pp. 4,5), a wholly unrelated case involving "aged Anna Richter" (p. 5) and even the totally unrelated matter involving John Zaccaro in the case of Conservatee Alice Phelan (p. 6). The climax of Appellant's argument, however, is where Appellant's statement accuses Appellee of having "helped bring the Mafia into the Conservatee's life" (p. 8) which is no more than a figment of Appellant's febrile imagination and so far from the truth that it is incredible that Appellant's statement to this Court includes this false and malicious charge.

Moreoever, a close examination of Appellant's Appendix and comparison of the papers in the state courts there allegedly reproduced discloses that of the 32 pages of Appendix no more than 3 pages are fully and accurately reproduced.

Further, the jurisdictional statement fails to comply with Rule 28.4 (c) in that it does not recite that 28 U.S.C. Sec. 2403 (b) may be applicable. Apparently the

jurisdictional statement was not served on the Attorney General of the State of New York.

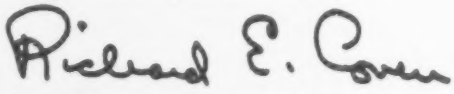
Lastly, Appellant's jurisdictional statement fails to specify the stage in the proceedings at which the questions sought to be reviewed were raised, the method or manner of raising them and the way in which they were passed upon by the courts, all as required by subdivision .1(g) of Rule 15. There has been a complete failure to comply with these requirements because it is impossible to do so, such questions never having been raised in the state courts.

CONCLUSION

For all of the foregoing, Appellee respectfully moves that this appeal be dismissed and that this Court grant to Appellee the costs on this appeal and such other

and further relief including, because of Appellant's improper notice of appeal and jurisdictional statement, such sanctions or damages pursuant to Rule 49.2 of the Rules of this Court as it may deem appropriate.

Respectfully submitted,



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